

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

|  |   |                      |
|--|---|----------------------|
| <b>ADA PITTS</b>                           | ) |                      |
| Claimant                                   | ) |                      |
| VS.  | ) |                      |
|  | ) | Docket No. 1,003,204 |
| <b>BAGEL WORKS</b>                         | ) |                      |
| Respondent                                 | ) |                      |
| AND  | ) |                      |
|  | ) |                      |
| <b>BERKLEY RISK ADMINISTRATORS COMPANY</b> | ) |                      |
| Insurance Carrier                          | ) |                      |

**ORDER**

Respondent appeals the July 15, 2002 preliminary hearing Order of Administrative Law Judge Julie A. N. Sample. Respondent contends claimant has failed to prove accidental injury arising out of and in the course of employment and timely notice. Claimant contends the evidence is sufficient to show that claimant suffered accidental injury while employed with respondent as a truck driver and delivery person, with notice provided specifically to the owners of respondent business.

**ISSUES**

- (1) Did claimant suffer accidental injury arising out of and in the course of her employment with respondent?
- (2) Did claimant provide timely notice of accident?
- (3) Did the Administrative Law Judge exceed her authority in granting medical benefits?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be reversed.

Claimant alleges accidental injury on February 2, 2002, and a series through February 23, 2002, or her last day of employment with respondent.

Claimant was a delivery driver for respondent and delivered racks of baked products weighing from 10 to 20 pounds per rack. Claimant would load anywhere from twenty to fifty racks onto her truck. Claimant testified that on February 2, 2002, she felt a sharp, stabbing pain in her neck, which she also described as a "ping" or a "twing" or a snap. Claimant testified she immediately told Steve Ellenberg, one of the co-owners, of the problems with her neck. Claimant further alleges that she requested medical treatment from him every day. Mr. Ellenberg, who testified at preliminary hearing, denied being advised at any time of a work-related injury while claimant was employed with respondent. The first notice he received of an alleged work-related injury came one to two months later, when he received a letter from claimant's attorney.

Respondent's co-owner, Enzo DiPede, did not testify, but filed an affidavit in this matter. In the affidavit, he denies being advised at any time that claimant suffered any accidental injury arising out of or in the course of her employment with respondent.

Claimant sought no immediate medical treatment for the neck injury, but did go to the emergency room immediately after the alleged accident. However, the emergency room notes indicate claimant was suffering from pneumonia. They failed to mention any injury to her neck or shoulder, or any trauma associated with her employment.

Claimant obtained medical care on several occasions after the alleged February 2 incident. The February 5 report discusses only claimant's pneumonia. On February 25, claimant complained of left shoulder pain, but advised the emergency room personnel that she slept on it funny. Again, there is no mention of any work-related connection to these symptoms. Claimant also denied any known trauma at that time. On February 28, 2002, claimant advised Terry S. Lee, M.D., that she had experienced pain in her neck and left shoulder for approximately one week. On March 4, she again returned to the emergency room with no mention of any work-related problems.

On March 13, 2002, claimant saw Stanley A. Bowling, M.D., on a referral from Dr. Rasmussen, who, as claimant stated, does not treat necks. Dr. Bowling, an orthopedic surgeon, recorded a history of left shoulder and neck pain for three weeks after claimant awoke, with no known trauma. The report does indicate claimant lifted trays of bread, weighing 25 to 30 pounds, but again claimant denied any incident which may have started her symptoms.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g). In order for claimant's testimony to be persuasive, it must be credible. On several occasions, claimant's testimony was contradicted by not only the medical records and other testimony, but by her own later testimony. Claimant was first deposed on June 28, 2002, during a discovery deposition. At that time, claimant denied having any job since leaving respondent on February 23. At the preliminary hearing of July 1, 2002, on cross-examination, claimant admitted that she worked for a place called

Roses Only on possibly one or two occasions after last working for respondent on February 23.

Claimant, at the discovery deposition, also denied having prior neck and shoulder symptoms. Claimant did acknowledge a prior workers' compensation claim to her knee from Trinity Lutheran Manor. During the preliminary hearing, claimant was forced to admit she suffered an automobile accident in 1997, resulting in whiplash and neck pain. Although claimant denied remembering the incident, medical records from Shawnee Mission Medical Center verified the occurrence. Claimant was also forced to acknowledge a September 5, 2001 pain drawing provided to Dr. Graham, showing neck pain and left shoulder pain. Again, claimant denied any memory of this incident, but the medical records verified same.

The Board acknowledges that claimant's testimony alone is sufficient to justify an award of workers' compensation benefits in certain instances. However, claimant's testimony is not sufficient to outweigh not only the testimony of respondent's employees, but also the medical records placed into evidence which, in several instances, contradicted claimant's testimony.

The Board finds based upon the evidence in the record that claimant has failed to prove that she suffered accidental injury arising out of and in the course of her employment. Therefore, the Order of the Administrative Law Judge granting claimant benefits in the form of medical treatment is reversed and those benefits are denied claimant.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Julie A. N. Sample dated July 15, 2002, should be, and is hereby, reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 2002.

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BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant  
Eric T. Lanham, Attorney for Respondent  
Julie A. N. Sample, Administrative Law Judge  
Director, Division of Workers Compensation